

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA : 07-CV-2067 (NGG)
:
v. :
:
CITY OF NEW YORK, : July 24, 2007
:
Defendant. : Brooklyn, New York
:
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TRANSCRIPT OF CIVIL CAUSE FOR INITIAL CONFERENCE
BEFORE THE HONORABLE ROANNE L. MANN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ 8-31-07 ★
BROOKLYN OFFICE

1 THE CLERK: Civil Cause for Initial Conference,
2 United States of America v. New York City, 07-CV-2067.
3 Counsel, please state your appearances for the record.

4 MS. SEELEY: Your Honor, this is Sharon Seeley for
5 the United States.

6 MR. SCHACHNER: Elliot Schachner, also for the United
7 States.

8 MR. REESE: David Reese, also for the United States.

9 MR. LEVY: I'm Richard Levy of Levy, Ratner. We
10 represent the proposed intervenors, Vulcan Society.

11 MR. DORN: Richard Dorn also from Levy, Ratner.

12 MS. LOSSEA: Dana Lossea, also from Levy, Ratner.

13 MS. KADIDAL: Shayana Kadidal from the Center for
14 Constitutional Rights for proposed plaintiff intervenor.

15 MS. PESTANA: Georgia Pestana from the Corporation
16 Counsel's Office for the City of New York.

17 MR. FRIEDMAN: Jason Friedman, also with the
18 Corporation Counsel.

19 MR. SHACKNAR: Don Shacknar, New York City Fire
20 Department.

21 MR. BLOCK: Michael Block for proposed defendant
22 intervenor, Firefighters Union.

23 THE COURT: Okay. Welcome to all of you. Please be
24 seated. This is on for an initial conference.

25 Before we turn to scheduling there are just some

1 factual matters that I wanted to address. The exam that was
2 administered in January 2007, this year, has the Department of
3 Justice made a determination that that does not -- either that
4 there's no impact or that it is job-related or if that matter
5 is still under consideration?

6 MS. SEELEY: No, Your Honor, we essentially have no
7 information at this point about the exam.

8 THE COURT: All right. As I understand it, the City
9 intends to use the eligibility list generated by Exam 2043
10 until it expires in -- I'm sorry, yes, Exam 2043 until it
11 expires in May of 2008?

12 MS. PESTANA: That's correct, Your Honor.

13 THE COURT: All right. I wasn't aware until
14 yesterday but I know you are going to be appearing before Judge
15 Garaufis later this afternoon. The motions to intervene are
16 before him and I don't even think they've all been fully
17 briefed yet but those matters will be handled by him as well as
18 the bifurcation motion. However, for purposes of discovery,
19 I'm prepared to bifurcate discovery. It's not a ruling on
20 whether or not the bifurcation will be a trial bifurcation,
21 that's a matter best left for the trial judge. But I am
22 prepared to bifurcate discovery. However, while I appreciate
23 the efforts that went into the parties' proposed discovery
24 schedule, I am concerned about the duration of discovery that's
25 proposed particularly given my decision to bifurcate discovery.

1 In preparing that proposed schedule you were contemplating that
2 that would only be liability discovery?

3 MS. SEELEY: Yes, Your Honor.

4 THE COURT: Well, I realize that this is a complex
5 case but at the same time it's a case that Judge Garaufis has
6 indicated he would like to have discovery so I'm not prepared
7 to give you all the time that you've requested although I will
8 give you a substantial portion of it and I know that at least
9 one of the proposed intervenors, the Vulcans, have requested a
10 longer period of discovery. As an initial matter, the Vulcans
11 are not yet in the case but if they want to participate in this
12 case they should recognize that the district court judge has
13 said that he wants discovery expedited and when the two
14 original parties to the case have proposed a schedule that they
15 feel they can live with then at minimum the intervenors should
16 be able to live with that schedule and, indeed, an even shorter
17 one that's going to be set by the Court.

18 Now, in looking over the parties' proposal it seemed
19 to me that even just to whittle this down a little bit is there
20 any reason why the City can't produce the applicant data by
21 September 10th?

22 MS. PESTANA: Yes, Your Honor, the issue is that
23 there's a class going in from Exam 2043 in August. So in order
24 to have the most up-to-date data for the experts to examine we
25 need at least until the end of September to incorporate what

1 happened to all the candidates that were considered for the
2 August class. Generally, the -- what they call the
3 certifications -- the list and the dispositions -- are returned
4 within thirty days and the Fire Department has committed to
5 doing that in thirty days or less but that's why we needed
6 until the end of September for that.

7 THE COURT: Well, when in August do they go in?

8 MS. PESTANA: I think it's August 14th. It's the
9 middle of August. I'm not sure of the exact date.

10 THE COURT: Well, the deadline that you proposed is
11 October 9th and considering, again, the wishes of the district
12 court and this Court if ordinarily it takes thirty days when
13 there is a Court order to expedite discovery they ought to be
14 prepared to do it more quickly. So if August 14th is the class
15 you haven't persuaded me that September 10th is unrealistic.

16 MS. SEELEY: I think the concern is that we wanted to
17 be accurate and to be entered in an electronic format so that
18 we can all use it and the experts be able to manipulate it so
19 that's why I think the additional time would be helpful in
20 making sure that we're all working off an accurate data set and
21 that includes as much information as we can and that would
22 leave one more class of 2043 and I think we've agreed that
23 we'll just deal with up through the appointments in the August
24 class for purposes of this case. So it's a concern that we
25 have the data in the most accurate format as well as the format

1 that will be most useful and easiest for the experts to deal
2 with in developing their expert reports. That's why I think
3 the additional time is warranted.

4 THE COURT: Well, you've talked me into four days,
5 September 14th which is 31 days from August 14th, and it may be
6 most useful since you've gone through the trouble of doing a
7 very detailed time line if we can all work from that same time
8 line. I'm looking at Page 5. So Item No. 1 would be September
9 14, 2007 and would otherwise be the same. The deadline for the
10 disclosures by the United States would then be November 9th.
11 That's in Item 2. Item 3, the deposition dates would be
12 November 26th to December 14th and I should add that I've
13 haven't -- the modifications that I did were not -- I didn't
14 simply adjust each one by the same amount of time. I took into
15 account intervening holidays and the like. I mean, frankly, if
16 you wanted to adjust the deadlines for the depositions of
17 experts, you know, if you're all in agreement, I don't have a
18 problem with that. I'd just try to come up with a deadline
19 that would slightly roll back the proposed deadlines and still
20 be substantially within -- would have substantially the same
21 time periods that have been proposed.

22 Let me just indicate to you why I'm doing this.
23 Ultimately, it's only going to be about a month shorter and
24 while that may seem like a lot of adjustments or not much of a
25 change, I was not -- the problem with having a discovery period

1 that ends in the middle of August is that everyone then is
2 probably going to be disappearing. I would like to have a
3 settlement conference or if need be a series of settlement
4 conferences with the parties after discovery on the liability
5 is completed and with the proposed time line that you've
6 presented that wouldn't happen until September. I think it's
7 in everyone's interest to get that done before everyone
8 disappears for the summer.

9 All right. Item No. 4 would be January 7th. Item
10 No. 5 would be January 24th through February 18th. Item No. 6
11 would be March 3rd. Item No. 7 would be March 24th through
12 April 18th. Item No. 8 would be May 2nd. Item No. 9 would be
13 May 14th to June 3rd and then discovery would end July 10th and
14 since the government prepared this document if you could
15 prepare a modified one just with those ten items and submit it
16 as an order, I'll sign it and if counsel want to confer and
17 just tweak some of those deadlines, I want to stay with the
18 July 10th close of discovery but within that if you want to
19 change a few dates here and there on consent that's fine with
20 me and we'll put this down for settlement conference, why don't
21 we say July 16th at 9:30 and we'll go all day if need be and if
22 we need to go over into the next day, July 17th.

23 Are there any other deadlines for discovery matters
24 that any of you would like to address?

25 MS. SEELEY: I don't believe so, Your Honor.

1 MS. PESTANA: No, Your Honor.

2 THE COURT: All right. Let me just go through --
3 just talk generally about the questionnaire. I'm going to sign
4 off on an order along the lines that I've reviewed with you as
5 far as the other matters in the questionnaire; the maximum
6 number of requests for admission, additional interrogatories
7 and the like. Unless the parties would like a Court order
8 embodying those limits, generally what I do, unless the parties
9 anticipate a dispute, is I leave it up to you. If it turns out
10 that somebody wants 250 requests for admission rather than 200
11 you would speak with opposing counsel. Presumably, you'd be
12 able to reach agreement. I wouldn't have to hear about it
13 unless there was a dispute that you couldn't resolve on your
14 own. Alternatively, it's going to be part of the Court order
15 as the other deadlines will be, if you want to modify it you
16 would need leave of the Court. So I would strongly encourage
17 you not to have that part of the Court order but if you're
18 aware of any lurking issues about the scope of discovery and
19 you want to have the limit as part of a Court order, I'm
20 prepared to sign off on it.

21 MS. SEELEY: Your Honor, so far we've been able to
22 work together really well so I don't think we would require a
23 Court order.

24 THE COURT: All right. Amendments of the pleadings
25 and additional parties. I will adopt those. That's Nos. 11

1 and 12. I'm not going to give you any deadlines now for
2 dispositive motions. Judge Garaufis requires that any party
3 wishing to make a dispositive motion write to him first and
4 request a pre-motion conference. You won't be deemed to have
5 waived a dispositive motion by not making that request before
6 the settlement conference.

7 Are there any other matters that any of you would
8 like included in the calendar order?

9 MS. SEELEY: Your Honor, will the other agreements of
10 the parties that were included in our document that we called
11 an attachment be in the order?

12 THE COURT: You mean in terms of the electronic
13 discovery and the like? Obviously, bifurcation -- I'm ruling
14 now that the schedule I've given you is for liability discovery
15 only and you're getting a year just for one phase. Let me just
16 say that if the case isn't resolved I don't intend to give you
17 another year for the damages discovery. Hopefully, as a result
18 of this discovery and the settlement conference we can try and
19 wrap the whole thing up.

20 Now, if the parties will prefer I will make myself
21 available for as long as it takes for the settlement
22 conference. Would the parties prefer be sent to a court of
23 next mediation [sic]?

24 MS. SEELEY: No, I don't believe we would prefer
25 that, Your Honor. I think --

1 THE COURT: You'll stick with me?

2 MS. SEELEY: We'll stick with you in this case.

3 THE COURT: You're stuck with me.

4 All right. If any discovery disputes come up during
5 the course of the case confer with one another informally to
6 try to resolve the matter without getting the Court involved.
7 If you need to have a Court ruling, discovery issues in the
8 first instance come to the magistrate so don't write to Judge
9 Garaufis unless you're filing an objection from one of my
10 rulings. In addition, most discovery disputes can be
11 adequately addressed in three pages or less which is the limit
12 in the Local Rules. That doesn't include attachments so if
13 it's a dispute about the scope of interrogatories you get your
14 three pages plus the attachments. Discovery letters should be
15 sent through ECF. All communications with the Court should be
16 sent through ECF. Responses to letters raising discovery
17 disputes should also comply with the three page limit and
18 should be sent through ECF. If you have one of those rare
19 discovery issues that can't be adequately addressed in three
20 pages, write and request permission to file something lengthier
21 but unless it's a very complex privilege issue, three pages
22 should be more than sufficient and I see that you've agreed
23 that the United States privilege log will be produced by August
24 10th. Are the parties contemplating that there are going to be
25 privilege disputes?

1 MS. SEELEY: We don't contemplate any dispute with
2 regard to those documents, Your Honor, mainly attorney/client
3 documents and some deliberative [sic] process.

4 THE COURT: All right. Because I'll tell you right
5 now that I am not going to be available for the latter part of
6 August so if it's possible to get the privilege log done sooner
7 so that any issues can be resolved before I go I would prefer
8 that.

9 Is there going to be a confidentiality agreement?

10 MS. SEELEY: Your Honor, the parties are working
11 right now on an agreed protective order and we think we have
12 come to agreement on almost all of the terms and the remaining
13 term is just a question more than a difference so we're hoping
14 to be able to submit an agreed protective order within the next
15 couple of days.

16 THE COURT: All right. The one thing that I should
17 bring to your attention because I often end up modifying the
18 proposed language of the parties, when there is confidential
19 material parties often say that any document containing
20 confidential material should be filed under seal and since
21 there is a presumption of public access I think the appropriate
22 way to handle it is to file a redacted copy under seal and then
23 an unredacted one can be filed under seal. I mean often we're
24 talking about one line in -- let's say it's a fifty page brief,
25 there really is no reason why the entire document should be

1 filed under seal and not accessible through the public court
2 file. Please make a provision in the agreement for that.

3 MS. SEELEY: Will do, Your Honor.

4 THE COURT: All right. Anything else?

5 MS. SEELEY: Not from the United States.

6 MS. PESTANA: No.

7 THE COURT: Did you miss any of the dates that I read
8 into the record?

9 MS. SEELEY: Your Honor, no other issues for the
10 United States.

11 MS. PESTANA: None for the City either.

12 THE COURT: All right. Just so that I have a control
13 date when can I expect the proposed order -- not the
14 confidentiality agreement but the scheduling agreement to be
15 filed? I understand that you may want to talk with one
16 another to tweak some of the dates. By the end of the week?

17 MS. SEELEY: By the end of the week, Your Honor.

18 THE COURT: Okay. Fine. I'll keep my eye out for
19 it.

20 Okay. Thank you very much.

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I certify that the foregoing is a transcript from an
electronic sound recording of the proceedings in the above-
entitled matter.

A handwritten signature in black ink, appearing to read 'Carla Nutter', is written over a horizontal line.

CARLA NUTTER

Dated: August 28, 2007